IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 789 of 1998
With
CRIMINAL APPEAL No. 842 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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STATE OF GUJARAT - Appellant(s)
Versus
BALVANTJI SUKHAJI DABHI & 2 - Opponent(s)

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Appearance :

CRIMINAL APPEAL No. 789 of 1998
MS HB PUNANI, APP for Appellant(s) : 1,
MR NITIN M AMIN for Opponent(s) : 1 – 3.

CRIMINAL APPEAL No. 842 of 1998
MR NITIN M AMIN for Appellant(s) : 1,
MS HB PUNANI, APP for Opponent(s) : 1 – 3.

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 04/04/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Criminal Appeal No.789 of 1998 under Sec.378 of the Code of Criminal Procedure ('the Code' for short) has been filed by the appellant-State against the acquittal of original accused Nos.1,2 and 3 while Criminal Appeal No.842 of 1998 under Sec.374 of the Code has been filed by the appellants-original accused Nos.4 and 5 against their conviction and sentence to undergo rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to undergo three months simple imprisonment for the offence under Sec.302 of IPC, by the learned Addl. Sessions Judge, Mehsana, vide impugned judgment and order dated 18-7-1998 passed in Sessions Case No.173 of 1997.

2. As both the appeals arose out of the same judgment and order dated 18-7-1998 passed in Sessions Case No.173 of 1997 by the learned Addl. Sessions Judge, Mehsana, they were heard together and are being decided by this common judgment.

3. The case of the prosecution in short is that on 2-3-1997, Gram Panchayat Election was going on in various booths at Dangarva Girls School for the Wards No.12 and 13 in Village

Dangarva, Taluka Kadi, District Mehsana. The deceased Babuji Daduji Dabhi was contesting from Ward No.13 and brother of the complainant was contesting from Ward No.12 while wife of Balvantji Sukhaji Dabhi was contesting for the post of Sarpanch on reserved seat. The accused No.2, a Peon of that School, was one of the persons on election duty. At about 1.30 p.m., when complainant was standing in queue along with other 7-8 persons for voting, accused No.2 was found to be influencing upon the voters and, therefore, deceased informed the same to Gandaji, who, in turn, asked Babuji to make a complaint before the concerned Officer. Meanwhile, accused Nos.4 and 5, who were standing under the tree in the compound of Girls School, rushed near to Booth No.4 where Babuji was also there. It is further the case of the prosecution that at that time, accused Nos.1,2 and 3 caught hold Babuji and accused No.5 snatched away the gupti which was in possession of accused No.4 and gave blow with it on the right side chest of Babuji due to which, Babuji fell down. Meanwhile, complainant and others reached the place of incident and accused persons ran away from the place of offence. Injured Babuji was immediately taken by the complainant and other relatives to a private

hospital of Dr.Amrutbhai Ishwarbhai Patel at Nandasan. Dr.Amrutbhai advised them to take the injured to Kadi Community Health Center and, therefore, in the same jeep, Babuji was taken to Community Health Center where on examination, Dr.Kalabhai Madhabhai Bajania declared him dead. Dr.Bajania therefore informed Kadi Police Station about the same over phone. In pursuance of that, PSO, Kadi Police Station, registered janvajog entry No.32/97 and informed concerned PSI on patrolling duty. PSI first went to the scene of offence and thereafter to Kadi Community Health Centre and recorded the complaint of the complainant Ganuji and same has been sent to PSO, Kadi Police Station for registering the offence. PSO, Kadi Police Station, registered the offence as Kadi Police Station I.C.R.No.65 of 1997 punishable under Secs.147, 148, 149, 302, etc. of IPC and handed over further investigation to concerned PSI. Simultaneously he made arrangements for preparing inquest panchnama of deceased and also sent dead body of the deceased with yadi to Dr.Bajania for performing post mortem. Dr.Bajania performed post mortem and issued report. Meanwhile, Investigating Officer went to the scene of offence, prepared the panchnama of scene of offence in presence of panchas and also

recorded statements of various witnesses. They also tried to search the accused and accused was arrested. As accused No.5 showed willingness to produce the weapon alleged to have been used in the commission of offence, he called panchas and prepared primary panchnama at Kadi police Station. Thereafter, he along with the accused, panchas and other police personnel proceeded in a jeep as guided by the concerned accused. Thereafter, accused asked to stop the jeep at a particular place and he found out and produced the muddamal gupti. Same was attached as muddamal article No.10 by drawing panchnama.

4. During the course of further investigation, he received a cross complaint filed by Balvantji Sukhaji against the witnesses of the present case and it has been registered as Kadi Police Station II C.R.No.78 of 1997 for the offences punishable under Secs.323, 504 and 114 of IPC and Sec.135 of Bombay Police Act and he investigated into that matter also.

5. The Investigating Officer also sent muddamal along with forwarding letter to FSL and on arrival of FSL and post mortem reports, same were kept in investigation file. At the end of investigation of Kadi Police Station I.C.R.No.65 of 1997, charge sheet was

submitted against the accused in the Court of learned J.M.F.C., Kadi. Similarly charge sheet against the witnesses in Kadi Police Station II C.R.No.78 of 1997 was also filed in the Court of learned J.M.F.C., Kadi.

6. As the offences alleged against the accused were exclusively triable by the Court of Sessions, the learned J.M.F.C., Kadi, committed the cases to the Court of Sessions at Mehsana where case arising out of Kadi Police Station I.C.R.No.65 of 1997 was numbered as Sessions Case No.173 of 1997 while case arising out of Kadi Police Station II-C.R.No.78 of 1997 was numbered as Sessions Case No.174 of 1997.

7. The learned Judge framed charge against the accused of I.C.R.No.65 of 1997 at Exh.6. The accused pleaded not guilty to the charge and prayed for trial.

8. To prove the case against the accused, the prosecution examined following 12 witnesses:

1) P.W.1, Ganuji Daduji Dabhi, Exh.35, the complainant and an eye witness.
2) P.W.2, Hayatkha Kalekha Khakhar, Exh.37, the panch witness. He has been declared as hostile.
3) P.W.3, Nashirkha Rasulbhai Malek, Exh.39, another panch witness. He has also been declared as hostile.
4) P.W.4, Gandaji Daduji Dabhi, Exh.40, brother

of the deceased Babuji and eye witness.

5) P.W.5, Dr.Kalabhai Madhabhai Bajania, Exh.43, the doctor who performed post mortem on the dead body of the deceased and proved the post mortem report Exh.44.

6) P.W.6, Dr.Amrutbhai Ishwarbhai Patel, Exh.46.

7) P.W.7, Ghulammustafa Rasulmiya, Exh.47, the police officer, who registered janvajog entry No.32/97 at Kadi Police Station.

8) P.W.8, Balwantsinh Manuji Dabhi, Exh.49, an eye witness.

9) P.W.9, Ismailbhai Mahmadbhai Patel, Home Guard, Exh.50 and another eye witness.

10) P.W.10, Dr.Bhaktibhai Varvabhai Prajapati Exh.51.

11) P.W.11, Madhusudan Nagarlal Trivedi, Exh.53, Investigating Officer, who was in charge of investigation from 4-3-2007 to 19-3-1997.

12) P.W.12, Ramanbhai Ataji Khant, Exh.56, PSI, Kadi Police Station, who took charge of investigation from 19-3-1997.

The prosecution also relied on various documentary evidence numbering 24 namely, vardhi i.e. Janvajog entry No.32/97 made on 2-3-1997 Exh.48; complaint filed by Ganuji Daduji Dabhi Exh.36; inquest panchnama Exh.19; panchnama of clothes of deceased Exh.20; panchnama of physical condition of accused Exh.21; panchnama of scene of offence

Exh.22; panchnamas of physical condition of accused Exhs.23, 24 and 25; forwarding specimens to FSL Exh.27; FSL report Exh.30; Serological Report Exh.31; map of scene of offence Exh.34; discovery panchnama drawn on 6-3-1997 Exh.38; post mortem report Exh.44; medical certificate Exh.52, etc.

9. On submission of closing pursis by the learned APP, learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of the Code qua incriminating evidence. Their defense was of denial in nature. The accused neither examined any witness nor stepped into the witness box.

10. After hearing the learned advocates appearing for the respective parties, learned Addl. Sessions Judge, Mehsana, delivered the impugned judgment and order on 18-7-1998 whereby the accused Nos.1,2 and 3 were acquitted of all the charges levelled against them whereas the accused Nos.4 and 5 were convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to undergo three months simple imprisonment for the offence under Sec.302 of IPC. It is this judgment and order, which gave rise for the appellant-State to prefer Criminal Appeal No.789 of 1998 against the acquittal of original accused Nos.1,2 and 3 in Sessions Case No.173

of 1997 and for the original accused Nos.4 and 5 therein to prefer Criminal Appeal No.842 of 1998 against their conviction and sentence.

11. Heard learned APP, Ms.H.B.Punani, for the appellant-State of Criminal Appeal No.789 of 1998 as well as for the respondent-State of Criminal Appeal No.842 of 1998 and learned counsel, Mr.Nitin M.Amin, for the respondents-original accused Nos.1,2 and 3 of Criminal Appeal No.789 of 1998 as well as for the respondents-original accused Nos.4 and 5 of Criminal Appeal No.842 of 1998 at length.

12. Learned counsel for the respective parties have mainly placed reliance upon the following witnesses, who, according to them, are witnesses of incident:

i) P.W.1, Gunaji Dadaji Dabhi, Exh.35, complainant through whom complaint Exh.36 has been proved.

ii) P.W.4, Gandaji Daduji Dabhi, Exh.40, brother of the deceased Babuji.

iii) P.W.8, Balwantsinh Manuji Dabhi, Exh.49, a social worker from Ahmedabad present there on the date of incident.

iv) P.W.9, Ismailbhai Mahmadbhai Patel, Exh.50, a Home Guard posted at Booth No.4 in Dangarva Girls School on the date of incident.

13. Ganuji Dadaji Dabhi, P.W.1, Exh.35, is the

brother of the deceased. He has deposed that he is the resident of Dangarva Village and on the day of incident, he also went to Dangarva Girls School to vote and he was standing in a queue at 1.30 p.m. along with 7-8 other persons. At that time, Babuji informed him that the accused No.2 Parthiji Sukhaji was trying to influence upon the voters and, therefore, though he has been posted on duty as an employee, Ganuji told Babuji to inform this to concerned Officer. At that time, Nilesh Nathuji i.e. accused No.4, who was standing in the compound of the School, came running towards Booth No.4 along with Prabhatji Sukhaji, i.e. accused No.5. He has further deposed that Nilesh Nathuji was having gupti in his hand and it was abruptly snatched away by Prabhatji who gave blow with it on the right side chest of Babuji as a result of which, Babuji received serious injuries and fell down. Thereafter, all the accused ran away. Thereafter, complainant and others took the injured Babuji in a jeep to Nandasan Dispensary where Dr.Amrutbhai examined him and informed that condition of the injured is serious and, therefore, he be shifted to Kadi Community Health Centre. Therefore, they went to Kadi Community Health Centre in the same jeep where Dr.Bajania, on examination of Babuji, declared him dead. He

has further deposed that he has filed the complaint to that effect. In paragraph 3 of his deposition, he has deposed that five years prior to the incident, a quarrel took place between Babuji and accused and complaint to that effect was lodged in which Babuji has been convicted by the court below. He had preferred appeal against the same and was enlarged on bail. Since there was enmity existing between the parties, the incident in question has been taken place. He has proved the FIR Exh.36 and also identified muddamal article No.10 gupti in the Court. He has categorically deposed that that was the weapon used by the accused No.5 in giving blow to his brother Babuji.

14. Chief and cross examination of the afore referred witness would clearly establish that the accused persons, the witnesses and the deceased are from the same Village coming under Kadi Taluka and they know each other since long. It would also establish that incident has taken place in broad day light at about 1.30 p.m. in the compound of Girls School and, therefore, there is no question of misidentification. Moreover, it also does not appear to be a case requiring holding of TI parade. The above referred witness has been thoroughly cross examined by the learned counsel for the accused. However, nothing

contrary came out weakening his evidence except his admission that when he saw the accused, they were not together but accused No.2 was standing away near booth No.4, accused Nos.4 and 5 were in the compound near the neem tree and accused Nos.1 and 3 were standing separately. Court below has also discussed the same at length in its judgment at page 36 onwards categorically holding that out of five accused, accused No.2 was there discharging his duty as an official on election duty where Balvantji Sukhaji Dabhi was contesting election from Ward No.12 and, therefore, his presence at the scene of offence would be quite natural. Wife of Balvantji was contesting election as a Sarpanch but on the reserved seat and, as other three persons, who are nearest relatives of the persons contesting the election, are from the same Village apart from they being voters, it was held after detailed discussion by the court below that their mere presence at the scene of offence would not involve them into the serious offences punishable under Secs.302, 147, 148, 149, etc. of IPC.

15. They have also relied upon the evidence of three eye witnesses i.e. Gandaji Daduji Dabhi, P.W.4 Exh.40; Balvantji Sukhaji Dabhi, P.W.8 Exh.49 and Ismailbhai Mahmadbhai Patel,

P.W.9, Exh.50. Of them, two witnesses i.e. P.W.4, Gandaji Daduji Dabhi and P.W.9, Ismailbhai Mahmadbhai Patel, are natural witnesses in view of the fact that Gandaji Daduji was contesting election while Ismail was posted as a Home Guard. As far as P.W.8, Balvantji Sukhaji Dabhi is concerned, it is established from his evidence that he is the permanent resident of Rakhial, Ahmedabad, and a contractor-cum-social worker and, therefore, he can be treated as a chance witness. However, we are not entering into the above aspects of the matter.

16. Facts remain that all the above referred three witnesses i.e. prosecution witnesses Nos.1,4 and 8 have fully supported the case of the prosecution mainly on material point by deposing that accused No.4 was standing in the compound of the Girls School under tree with gupti in his hand along with accused No.5. Both were running towards place of incident from where accused No.5 snatched away gupti from the accused No.4 and gave severe blow on vital part of the body of Babuji i.e. right side chest as a result of that, Babuji received grievous injuries and ultimately succumbed to those injuries. As stated above, it is established from the evidence of above witnesses that as the incident had taken place in broad day light,

all the witnesses had an opportunity to see each other. In all, 50-60 persons were present there and they are from the same Village. However, there are some material contractions or omissions among their evidence as to catching-hold of the deceased by the accused Nos.1,2 and 3. This had appealed to the court below also while evaluating the evidence of above referred three witnesses and ultimately came to the conclusion that in this case, offences punishable under the above referred sections cannot be attracted against them in view of failure of the prosecution to prove the role of the original accused Nos.1,2 and 3 in the crime in question. Their mere presence at the time of incident would not be sufficient to fasten them with the serious offence of Sec.302 etc. of IPC.

17. We also share the same view and we are of the opinion that prosecution has failed to prove that there was an unlawful assembly in which, the original accused Nos.1,2 and 3, were members of said unlawful assembly and continuously remained as such till the end and committed the offence. In absence of cogent evidence, we agree with the finding arrived at by the court below that they were not members of unlawful assembly and remained continued as such till the last. Therefore,

court below has acquitted them of the charges levelled. However, court below has convicted the original accused Nos.4 and 5 mainly on the ground of accused No.4 having deadly weapon gupti in his possession and accused No.5 having given gupti blow on vital part of the body of the deceased resulting into offence under Sec.302 of IPC.

18.We have also evaluated the medical evidence i.e. the evidence of P.W.5, Dr.Kalabhai Madhabhai Bajania, Exh.43, the doctor, who performed post mortem on the dead body of the deceased Babuji and prepared the post mortem report Exh.44. He was discharging his duty as a Medical Officer at Kadi Community Health Centre and informed PSI, Kadi Police Station, by way of telephonic vardhi. It is through him, prosecution has proved the death of the deceased as homicidal death on succumbing to the chest injuries sustained. As per his deposition, gupti blow given on right side chest of the deceased entered into right side ribs No.8 and 9 and punctured the liver and caused wound of 12 cm. in deep. After seeing the muddamal article No.10-gupti, he has categorically opined before the Court that injuries received by Babuji was possible by way of muddamal article No.10 and which was sufficient in the ordinary course of nature to cause death of the deceased.

19.We have also gone through the evidence of P.W.6, Dr.Amrutbhai Ishwarbhai Patel, who is having his dispensary at Nandasan.

20.As the learned counsel for the accused persons has not disputed the death of the deceased as homicidal, we are not discussing further on the said aspect. Thus, it is established that deceased died homicidal death. Apart from that, there are three eye witnesses who have categorically deposed the role of the original accused Nos.4 and 5 along with their active involvement into the crime in question and nothing has come out in their cross examination so as to weaken their evidence.

21.As stated earlier, it is proved that the accused, witnesses and deceased are from the same Village and the incident has taken place in broad day light and hence, there is no question of misidentification of accused or falsely identifying the accused. Not only that, accused No.5 has shown willingness to produce the muddamal article No.10-gupti which has been used in the commission of crime and hidden by him and, therefore, same has been attached by drawing panchnama under Sec.27 of the Indian Evidence Act.

22.We have also evaluated the evidence of panchas for proving the discovery panchnama Ex.38. They are P.W.2, Hayatkha Kalekha

Khakhar, Exh.37 and P.W.3, Nashirkha Rasulbhai Malek, Exh.39. However, it is required to be noted that they have not supported the version of the panchnama though they admitted to have put their signatures in the panchnama. They have stated in chief examination that they have simply signed the panchnama in Kadi Police Station. They have been declared as hostile. When they have been thoroughly cross examined by learned APP, nothing has come out to support the say of the prosecution.

23. It may however be noted that prosecution has proved the discovery panchnama through the evidence of Investigating Officer, Madhusudan Nagarlal Trivedi, who has been examined as P.W.11 at Exh.53. Same has been dealt with by the court below in its judgment. We have gone through the same and we are of the opinion that if the witnesses, for the reasons best known, do not support the say of the prosecution, prosecution will not become helpless even in view of recent trend of the panchas of not supporting the say of the prosecution. Law on this point is also clear wherein it has been held that if Police Officer is able to prove the panchnama and the version given in the panchnama in toto and if he stuck to the same in the cross examination then, panchnama cannot be

discarded merely because panchas did not support the panchnama. As per the deposition of Investigating Officer, muddamal has been found out and produced by the accused from a place known to him alone and inaccessible to all concerned. FSL experts were not able to give any specific opinion as to which blood group the blood stains found on the muddamal belonged to. However, they have opined that blood stains found on the muddamal were of human blood. Therefore, prosecution is able to prove that muddamal gupti, a deadly weapon, seized at the instance of accused No.5, has been used by him in inflicting blow on vital part of the body of the deceased with full force. It is true that a single blow has been inflicted by the accused. However, keeping in mind the force applied by the accused in inflicting the single blow, we are unable to accept the arguments advanced by the learned counsel for the accused, Mr.Amin, that case of the accused Nos.4 and 5 would fall under Sec.304 Part II. Same has been discussed in detail by the court below in its judgment and, therefore, we are not repeating but are only reiterating the same at this stage. The deadly weapon used by the accused No.5 in inflicting blow on the vital part with force would indicate the definite intention of the

accused No.5 in causing the death of the deceased and he became successful in fulfilling his intention by killing the deceased and, therefore, we are not giving any benefit to accused No.5. We therefore hold that the conviction and sentence imposed upon the accused No.5 by the court below are just and proper.

24. As far as accused No.4 is concerned, the evidence available against him is that he was found in the compound of the Girls School along with muddamal article No.10-gupti. Except that, there are no evidence to connect him into the crime in question including his alleged attempt of catch-holding the deceased. Therefore, the arguments advanced by Mr.Amin that at the most the offence against the accused No.4 would be that he was found in possession of deadly weapon in the Girls School premises and that too, not within constructed area but in the premises of the School and, therefore, according to him, he can be convicted for the same. Mr.Amin also argued that the accused No.4 has been undergoing sentence since last more than 10 years and, therefore, in any circumstances of the matter, he is required to be acquitted keeping in mind all aspects of the matter and considering the insufficiency of material evidence available against him.

25. We have evaluated the evidence on record qua the accused No.4 and we are of the opinion that the prosecution is able to prove that he was present in the School premises with gupti in his possession and tried to run towards the place of incident. We may say that it is a general human tendency to reach at a place where something is going on. It is not the case of the prosecution that before he went there, incident has been taken place and he went there for that purpose. In view of the aforesaid, the accused No.4 is entitled to the benefit of doubt and hence, he is required to be acquitted.

26. In view of the detailed discussion and evaluation of the evidence of eye witnesses, no separate discussions are required to be made as regards appeal being Criminal Appeal No.789 of 1998 filed by the State is concerned. However, we are of the opinion that prosecution has failed to prove the case against the original accused Nos.1,2 and 3 beyond reasonable doubt that they had caught hold the deceased at the time of incident and, therefore, court below has rightly acquitted them of the charges levelled. We also give them benefit of doubt. In view of the above, Criminal Appeal NO.789 of 1998 is required to be dismissed.

27. Criminal Appeal No.789 of 1998 is

dismissed.

Criminal Appeal No.842 of 1998 is partly allowed. Judgment and order of conviction and sentence dated 18-7-1998 delivered by the learned Sessions Judge, Mehsana, in Sessions Case No.173 of 1997 are quashed and set aside qua the appellant No.1-original accused No.4-Nileshkumar Nathuji Dabhi. He is therefore ordered to be set at liberty forthwith, if not required in any other offence. However, judgment and order of conviction and sentence qua the appellant No.2-original accused No.5-Prabhatji Sukhaji Dabhi are confirmed.

28. Office shall place a copy of this judgment in each appeal.

(R.P.DHOLAKIA,J.)

(HARSHA DEVANI,J.)

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